Zulzamri bin Zulkifli v Public Prosecutor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05(M)-616–12 OF 2019, W-05(M)-617–12 OF 2019 AND W-05(M)-618–12 OF 2019
KAMALUDIN MD SAID, LEE HENG CHEONG AND HASHIM HAMZAH JJCA
11 OCTOBER 2022

Criminal Law — Dangerous drugs — Trafficking — Whether appellants rightly convicted by trial judge for trafficking and possession of variety of dangerous drugs — Whether prosecution had established beyond reasonable doubt that appellants had custody, control and knowledge of the drugs — Whether appellants failed to raise reasonable doubt in prosecution's case and also failed to rebut presumption of trafficking under Dangerous Drugs Act 1952 — Whether convictions of appellants were safe — Whether their appeals against conviction and sentence had no merit

The two appellants in the three appeals herein were sentenced to death as well as to varying terms of imprisonment by the High Court after they were found guilty of trafficking and for unlawful possession of dangerous drugs under ss 39B(1)(a) and 12(2), respectively, of the Dangerous Drugs Act 1952 ('the DDA'). Altogether, six charges were jointly preferred against the appellants — four for unlawful possession of 17.6g nimetazepam, 0.23g heroin, 0.03g monoacetymorphines and 2.15g ketamine in an apartment that they both occupied, one charge of trafficking in 269.21g methamphetamine in the same apartment and one charge of trafficking in 54,215g cannabis which was found in a car parked in a parking lot of the said apartment. All the charges were alleged to have been committed in furtherance of a common intention pursuant to s 34 of the Penal Code. The first appellant ('Zulzamri') was convicted on all the six charges whereas the second appellant ('Nur Syafiqah') was acquitted of the cannabis trafficking charge but convicted on all the remaining charges. They were sentenced to death on the trafficking charges, three years' jail on the nimetazepam possession charge and one year's jail on each of the remaining charges. According to the prosecution's evidence, a police party led by SP6 raided the apartment for suspected dangerous drug activities. At the time of the raid, only the first and second appellants, who claimed they were engaged to be married, were in the apartment. After finding the drugs kept in various places in the apartment, the appellants led the police team to the apartment's car park where they recovered the cannabis from the rear passenger seat floor and boot of the car. Evidence was led that the appellants stayed together in the apartment which Nur Syafiqah had rented whilst the car in which the cannabis was found was bought by Zulzamri although registered in

his younger brother's name. In convicting the appellants, the High Court found that they had exclusive access to and possession of the apartment, that they were unable to give a reasonable explanation for the existence of the drugs in the apartment and in the car and could not raise a reasonable doubt in the prosecution's case against them or rebut the presumption of trafficking invoked against them under s 37 of the DDA. Zulzamri denied knowledge of the cannabis in the car, saying that the vehicle had been borrowed by his friend ('Murugan') who was subsequently arrested and interrogated by police but was not called as a witness at the trial. In the instant appeal against their convictions and sentences, the appellants essentially raised three issues: (a) that there was no proof that they had committed the offences in furtherance of a common intention; (b) that SP6's testimony was uncorroborated and unsafe to be relied upon; and (c) that adverse inference should have been invoked against the prosecution for failing to call Murugan, which failure had not only created a gap in the prosecution's case but had also prejudiced their defence.

Held, unanimously dismissing the appeals and affirming the convictions and sentences:

(1) There was no error in the trial judge's findings and conclusion that the appellants had acted in furtherance of a common intention in committing the charges that were preferred against them. The trial judge had carefully and meticulously examined each and every piece of circumstantial evidence adduced before her, drawing the appropriate inferences and findings of facts and applying the legal principles associated with s 34 of the Penal Code before concluding that the appellants had acted with common intention in the trafficking and possession of the drugs in the instant case (see paras 32 & 35).

(2) The fact that the appellants stayed together in the apartment and had exclusive access to and possession thereof, the presence of the drugs in parts of the house which were used daily and the open display of paraphernalia which could be used both for drug consumption as well as for packaging — all of these went towards giving the inference of common intention between the appellants in relation to the drugs in question (see paras 13 & 32–36).

(3) The trial judge had correctly found from the evidence that the prosecution had proven that both the appellants had control, custody and knowledge of the drugs in the apartment and that the first appellant had control, custody and knowledge of the drugs in the car and such evidence had not been rebutted by the appellants. In the light of the trial judge's finding that SP6 was a credible witness and that his evidence was also credible, there was no good reason for this court to interfere with that finding as SP6 was a competent witness and his evidence did not have to be corroborated (see paras 38–39 & 41–43).

(4) Given the weight of the dangerous drugs in the trafficking charges and the trial judge's finding that the appellants had actual possession thereof, the trial judge had correctly invoked the presumption of trafficking against them under the DDA. There was no basis to the appellants' claim that the trial judge had relied upon a 'presumption upon a presumption' under s 37 of the DDA to convict them (see paras 44 & 53–56).

(5) There was no basis to draw an adverse inference against the prosecution under s 114(g) of the Evidence Act 1950 for not calling Murugan to testify as he was not relevant or material to the prosecution's case. The defence could have always called Murugan in support of their case. In any event, the prosecution was not guilty of any suppression of evidence for s 114(g) to be invoked. The prosecution had adduced sufficient evidence to prove the charges against the appellants even without calling Murugan (see paras 49–50 & 52).

(6) The trial judge correctly found that the defences of the appellants were mere denials of the existence of the drugs found in the apartment and in the car and that they failed to create a reasonable doubt on the prosecution's case and also failed to rebut the presumption of trafficking under s 37 of the DDA on a balance of probabilities. The grounds of judgment showed that the trial judge had thoroughly assessed the defence's cases before coming to her findings. The convictions against the appellants were safe and there was no merit in their instant appeals (see paras 57–60).

[Bahasa Malaysia summary

Kedua-dua perayu dalam tiga rayuan di sini telah dijatuhkan hukuman mati serta pelbagai tempoh penjara oleh Mahkamah Tinggi selepas mereka didapati bersalah mengedar dan memiliki dadah berbahaya secara tidak sah di bawah ss 39B(1)(a) dan 12(2), masing-masing, Akta Dadah Berbahaya 1952 ('ADB'). Secara keseluruhannya, enam pertuduhan diutamakan secara bersama terhadap perayu — empat kerana memiliki 17.6g nimetazepam secara tidak sah, 0.23g heroin, 0.03g monoacetymorphines dan 2.15g ketamin di sebuah pangsapuri yang mereka berdua duduki, satu pertuduhan mengedar 269.21g methamphetamine di pangsapuri yang sama dan satu pertuduhan mengedar 54,215g ganja yang ditemui di dalam kereta yang diletakkan di tempat letak kereta pangsapuri tersebut. Kesemua pertuduhan tersebut didakwa atas niat yang sama menurut s 34 Kanun Keseksaan. Perayu pertama ('Zulzamri') disabitkan atas kesemua enam pertuduhan manakala perayu kedua ('Nur Syafiqah') telah dibebaskan daripada pertuduhan mengedar ganja tetapi disabitkan dengan semua pertuduhan yang selebihnya. Mereka dijatuhi hukuman mati atas tuduhan pengedaran, penjara tiga tahun atas tuduhan memiliki nimetazepam dan penjara satu tahun bagi setiap pertuduhan yang selebihnya. Menurut keterangan pihak pendakwaan, pihak polis diketuai SP6 menyerbu pangsapuri berkenaan kerana disyaki melakukan kegiatan dadah

berbahaya. Ketika serbuan, hanya perayu pertama dan kedua, yang mendakwa mereka telah bertunang, berada di apartmen tersebut. Selepas mendapati dadah disimpan di pelbagai tempat di apartmen tersebut, perayu mengetuai pasukan polis ke tempat letak kereta pangsapuri di mana mereka menemui ganja dari bawah tempat duduk penumpang belakang dan but kereta. Keterangan menunjukkan bahawa perayu tinggal bersama di pangsapuri yang disewa Nur Syafiqah manakala kereta di mana ganja ditemui dibeli oleh Zulzamri walaupun didaftarkan atas nama adiknya. Dalam mensabitkan perayu, Mahkamah Tinggi mendapati bahawa mereka mempunyai akses eksklusif dan memiliki pangsapuri tersebut, bahawa mereka tidak dapat memberikan penjelasan yang munasabah untuk kewujudan dadah di dalam pangsapuri dan di dalam kereta dan tidak boleh menimbulkan keraguan yang munasabah dalam kes pendakwaan terhadap mereka atau menyangkal anggapan pengedaran yang digunakan terhadap mereka di bawah s 37 ADB. Zulzamri menafikan mengetahui ganja di dalam kereta, menyatakan kenderaan tersebut telah dipinjam oleh rakannya ('Murugan') yang kemudiannya ditahan dan disoal siasat polis tetapi tidak dipanggil sebagai saksi pada perbicaraan. Dalam rayuan semasa terhadap sabitan dan hukuman mereka, perayu-perayu pada dasarnya membangkitkan tiga isu: (a) bahawa tiada bukti bahawa mereka telah melakukan kesalahan-kesalahan tersebut dalam meneruskan niat bersama; (b) bahawa keterangan SP6 tidak disokong dan tidak harus dipercayai; dan (c) bahawa anggapan bertentangan sepatutnya dikenakan terhadap pihak pendakwaan kerana gagal memanggil Murugan, yang mana kegagalan tersebut bukan sahaja mewujudkan jurang dalam kes pendakwaan tetapi juga menjejaskan pembelaan mereka.

Diputuskan, sebulat suara menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Tiada kekhilafan dalam dapatan dan kesimpulan hakim perbicaraan bahawa perayu-perayu telah bertindak untuk meneruskan niat bersama dalam melakukan pertuduhan yang diutamakan terhadap mereka. Hakim perbicaraan telah meneliti dengan teliti dan berhati-hati setiap keterangan mengikut keadaan yang dikemukakan di hadapannya, membuat kesimpulan dan dapatan fakta yang sesuai dan menggunakan prinsip undang-undang yang berkaitan dengan s 34 Kanun Keseksaan sebelum membuat kesimpulan bahawa perayu telah bertindak dengan niat yang sama dalam pengedaran dan pemilikan dadah dalam kes semasa (lihat perenggan 32 & 35).

(2) Hakikat bahawa perayu tinggal bersama di pangsapuri tersebut dan mempunyai akses eksklusif dan memilikinya, kehadiran dadah di bahagian rumah yang digunakan setiap hari dan paparan terbuka peralatan yang boleh digunakan untuk penggunaan dadah dan juga untuk pembungkusan — semua ini menuju ke arah memberikan inferens niat bersama antara perayu berhubung dengan dadah yang

dipersoalkan (lihat perenggan 13 & 32–36).

(3) Hakim perbicaraan telah mendapati dengan betul daripada keterangan bahawa pihak pendakwaan telah membuktikan bahawa kedua-dua perayu mempunyai kawalan, jagaan dan pengetahuan tentang dadah di dalam pangsapuri tersebut dan bahawa perayu pertama mempunyai kawalan, jagaan dan pengetahuan tentang dadah di dalam kereta dan keterangan tersebut tidak disangkal oleh perayu. Berdasarkan dapatan hakim perbicaraan bahawa SP6 adalah saksi yang boleh dipercayai dan keterangannya juga boleh dipercayai, tidak ada sebab yang kukuh untuk Mahkamah ini mengganggu dapatan tersebut kerana SP6 adalah saksi yang berwibawa dan keterangannya tidak perlu disokong. (lihat perenggan 38–39 & 41–43).

(4) Memandangkan berat dadah berbahaya dalam pertuduhan pengedaran dan keputusan hakim perbicaraan bahawa perayu-perayu mempunyai pemilikan sebenar, hakim perbicaraan telah menggunakan anggapan pengedaran terhadap mereka dengan betul di bawah ADB. Tiada asas kepada dakwaan perayu bahawa hakim perbicaraan telah bergantung kepada 'anggapan atas anggapan' di bawah s 37 ADB untuk mensabitkan mereka (lihat perenggan 44 & 53–56).

(5) Tiada asas untuk membuat anggapan bertentangan terhadap pihak pendakwaan di bawah s 114(g) Akta Keterangan 1950 kerana tidak memanggil Murugan untuk memberi keterangan kerana beliau tidak relevan atau material kepada kes pendakwaan. Pihak pembelaan boleh sentiasa memanggil Murugan untuk menyokong kes mereka. Walau apa pun, pihak pendakwaan tidak bersalah atas sebarang penindasan keterangan untuk s 114(g) yang akan diguna pakai. Pihak pendakwaan telah mengemukakan keterangan yang mencukupi untuk membuktikan pertuduhan terhadap perayu-perayu walaupun tanpa memanggil Murugan (lihat perenggan 49–50 & 52).

(6) Hakim perbicaraan dengan betul mendapati bahawa pembelaan perayu hanyalah penafian kewujudan dadah yang terdapat di dalam pangsapuri dan di dalam kereta dan bahawa mereka gagal menimbulkan keraguan munasabah ke atas kes pendakwaan dan juga gagal untuk menangkis anggapan pengedaran di bawah s 37 ADB atas imbangan kebarangkalian. Alasan penghakiman menunjukkan bahawa hakim perbicaraan telah menilai dengan teliti kes-kes pembelaan sebelum membuat dapatannya. Sabitan terhadap perayu dikekalkan dan tiada merit dalam rayuan semasa mereka (lihat perenggan 57–60).]

Cases referred to

Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1; [2015] 5 CLJ 780, FC (refd)

Krishna Rao a/l Gurumurthi v PP and another appeal [2009] 3 MLJ 643; [2009] 2 CLJ 603, FC (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705; [2000] 4 CLJ 649, FC (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630, FC (refd)
Tan Kim Ho & Anor v PP [2009] 3 MLJ 151; [2009] 3 CLJ 236, HC (refd)
Zulfikar bin Mustaffah v PP [2001] 1 SLR 633, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), (3), 37(d), (da), (da)(vii), (da)(xvi), 39B(1)(a)
Evidence Act 1950 s 114 (g)
Penal Code s 34

Hasnan bin Hamzah (with Qushwa) for the first appellant.
M Manoharan (M Manoharan & Co) for the second appellant.
Nahra bt Dollah (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Lee Heng Cheong JCA:

[1] Zulzamr bin Zulkifli ('first appellant') and Nur Syafiqah bt Mohammad Bakri ('second appellant') were charged with six charges in the High Court and the six charges are as follows:

First charge

> Bahawa kamu bersama-sama pada 5 Januari 2017 jam lebih kurang jam 11.30 pagi di dalam kereta proton satria warna silver bernombor pendaftaran wes 1692, di lot 501 parking aras 1, Regalia Service Apartment, No 2, Jalan Anjung Putra off Jalan Sultan Ismail, dalam Daerah Dang Wangi, dalam Wilayah Persekutuan Kuala Lumpur bagi mencapai niat bersama kamu telah memperedarkan dadah berbahaya iaitu cannabis seberat 54,215 gram dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 39b(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39b(2) Akta yang sama dibaca bersama seksyen 34 kanun keseksaan. ('first charge')

The second charge

> Bahawa kamu bersama-sama pada 5 Januari 2017 jam lebih kurang jam 9.45 pagi di premis b-16-10, Regalia Service Apartment, No 2, Jalan Anjung Putra off Jalan Sultan Ismail, dalam Daerah Dang Wangi, dalam Wilayah Persekutuan Kuala Lumpur bagi mencapai niat bersama kamu telah memperedarkan dadah berbahaya iaitu methamphetamine seberat 269.21 gram dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 39b(1)(a) akta dadah berbahaya 1952 yang boleh dihukum di bawah seksyen 39b(2) akta yang sama dibaca bersama seksyen 34 kanun keseksaan. ('second charge')

The third charge

Bahawa kamu bersama-sama pada 5 Januari 2017 lebih kurang jam 9.45 pag/ di premis b-16-10, Regalia Service Apartment, No 2, Jalan Anjung Putra off Jalan Sultan Ismail, dalam Daerah Dang Wangi, dalam Wilayah Persekutuan Kuala Lumpur bagi mencapai niat bersama kamu telah ada dalam milikan kamu dadah berbahaya sejumlah berat 17.60 gram nimetazepam dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 12(2) akta dadah berbahaya 1952 yang boleh dihukum di bawah seksyen 12(3) akta yang sama dan dibaca bersama seksyen 34 kanun keseksaan. ('third Charge')

The fourth charge

Bahawa kamu bersama-sama pada 5 Januari 2017 lebih kurang jam 9.45 pagi di premis B-16-10, Regalia Service Apartment, No 2, Jalan Anjung Putra off Jalan Sultan Ismail, dalam Daerah Dang Wangi, dalam Wilayah Persekutuan Kuala Lumpur bagi mencapai niat bersama kamu telah ada dalam milikan kamu dadah berbahaya sejumlah berat 0.23 gram heroin dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 12(2) akta dadah berbahaya 1952 yang boleh dihukum di bawah seksyen 12(3) akta yang sama dan dibaca bersama seksyen 34 kanun keseksaan. ('4th Charge')

The fifth charge

Bahawa kamu bersama-sama pada 5 Januari 2017 lebih kurang jam 9.45 pagi di premis B-16-10, Regalia Service Apartment, No 2, Jalan Anjung Putra off Jalan Sultan Ismail, dalam Daerah Dang Wangi, dalam Wilayah Persekutuan Kuala Lumpur bagi mencapai niat bersama kamu telah ada dalam milikan kamu dadah berbahaya sejumlah berat 0.03 gram monoacetylmorphines dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 12(2) akta dadah berbahaya 1952 yang boleh dihukum di bawah seksyen 12(3) akta yang sama dan dibaca bersama seksyen 34 kanun keseksaan. ('fifth charge')

The sixth charge

Bahawa kamu bersama-sama pada 5 Januari 2017 lebih kurang jam 9.45 pagi di premis B-16-10, Regalia Service Apartment, No 2, Jalan Anjung Putra off Jalan Sultan Ismail, dalam Daerah Dang Wangi, dalam Wilayah Persekutuan Kuala Lumpur bagi mencapai niat bersama kamu telah ada dalam milikan kamu dadah berbahaya sejumlah berat 2.15 gram ketamine dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 12(2) akta dadah berbahaya 1952 yang boleh dihukum di bawah seksyen 12(3) akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan. ('sixth Charge')

[2] At the end of the prosecution's case, the learned High Court judge ('learned High Court judge') found that the prosecution has proven a prima facie case against the first appellant and ordered him to enter his defence in respect of the six charges preferred against him. In respect of the second appellant, the learned High Court judge called the second appellant to enter her defence in respect of second to the sixth charges and acquitted her, of the first charge.

[3] At the end of the defences' cases, the learned High Court judge convicted the first appellant, on all the six charges while second appellant was convicted on the second charge to the sixth charge. The learned High Court judge then sentenced the first and second appellants to death on the second charge under s 39B(1)(a) of Dangerous Drugs Act 1952 ('the DDA 1952'), three years' imprisonment for the third charge and one year's imprisonment for the fourth to sixth charge under s 12(2) of DDA 1952 and s 12(3) of the same Act.

[4] Being aggrieved, both the first and second appellants appealed against the convictions and sentences imposed by the learned High Court judge. The six charges formed the subject matter of the three appeals which are jointly heard before us.

[5] We heard the above three appeals of the first and second appellants on 12 January 2022. After perusing through the appeal records and after hearing submissions from all parties, we find no appealable errors in the decision of the learned High Court judge. We, unanimously dismissed the three appeals of the first and second appellants and we affirmed the convictions and sentences imposed by the learned High Court judge. Herein below are our grounds for the dismissal of the three appeals.

THE FACTS OF THE PROSECUTION'S CASE

[6] On 5 January 2017, at about 9.30am, one lnspector Murugan a/l Suppiah ('SP6') together with a team of policemen from the Narcotics Criminal Investigation Department, Ibu Polis Daerah Dang Wangi ('IPD Dang Wangi') raided a premise located at Apartment B-16-10, Regalia Service Apartments, No 2, Jalan Anjung Putra, Off Jalan Sultan Ismail, Kuala Lumpur ('the apartment') for suspected drugs activities.

[7] SP6 and the raiding team arrived at the scene at about 9.40am and went to the apartment, assisted by the chief security guard of the Regalia Service Apartments, SP4, Mohammad Faizal bin Abdullah because SP6 and the raiding team do not have the access card to enter the apartment.

[8] When they arrived at the apartment, SP6 found the door of the apartment locked. SP6 then knocked at the door of apartment and the second appellant opened the door. Then SP6 and the raiding party entered the apartment and arrested the second appellant. At that point of time, SP6 saw that the first appellant was seated at the living hall of the apartment.

[9] SP6 detained the second appellant after introducing himself, as a senior police officer, by showing his police authority card. SP6 did a bodily search on the second appellant and found nothing.

The kitchen of the apartment

[10] Then in the presence of the first and second appellants as well as another police witness, SP6 inspected the kitchen of the apartment ('kitchen') and have found one large blue plastic bag with the following words 'AEON Go Green With Us' written on it, located in the cabinet under the sink in the Kitchen. Inside the large blue plastic bag, there are two colored plastic bags with the words 'PIAU SIANG' written in yellow red.

[11] In the first 'PIAU SIANG' plastic bag, there are 12 bond foil pill erimin 5, and each bond foil contains 25 erimin 5 foils. Each piece of foil contains ten pills. The total amount is as many as 3,000 pills, weighing 17.6g of nimetazepam. Inside the second plastic bag with the words 'PIAU SIANG', he found two packages of transparent plastic bags which contained drugs, weighing 269.1g of methamphetamine.

The living hall of the apartment

[12] Further inspection of the living hall area of the apartment ('living hall'), resulted in the discovery of one yellow/black coloured box with the words written 'COHIBA' on it, on the small table, containing the followings:

(a) one small package of transparent plastic containing eight pills 'WY' weighing 0.11g of methamphetamine;

(b) two transparent plastic packages containing drugs to wit: 0.23g of heroin and 0.03g of monoacetylmorphines; and

(c) one plastic transparent plastic package containing drugs weighing 2.15g of ketamine.

The guest room of the apartment

[13] Further inspection and examination of the guest room in the apartment ('guest room') , resulted in the discovery of the following equipment:

(a) one impulse tool sealer;

(b) one bottle glass tool for inhaling drugs;

(c) one burner — 'HONEST' brand;

(d) one house key with the words 'St. Guchi'

(e) two units of house access cards — with the words, 'Regalia 8–16–10' on them;

(f) one parking card for Regalia Apartments; mixed cash — total RM27,656 an agreement dated 1 June 2016 between Wan Norashikin bt David and Nur Syafiqah bt Mohammad Bakri;

(g) two sets of car keys together with the car alarm control which were hanging on the wall of the of the living room;

(h) one green coloured shirt with the following words 'PDI' written on it;

(i) two pairs of red coloured women's blouses;

(j) one pair of jean pants which is blue with the brand 'Nudie jeans co'; and

(k) one bond empty transparent plastic.

[14] As a result of interrogation and with the guidance of the first appellant and the second appellant, SP6 and the raiding team were taken to Car Park Lot 501, at Parking Level 1, Regalia Service Apartments ('Car Park Lot 501'). Upon arrival, the second appellant showed SP6, a Proton Satria car, bearing registration number, WES 1692 ('Proton Satria'). SP6 then inspected the car and found all the car doors and windows in good condition and locked. SP6 then opened the door of the Proton Satria, using the car alarm control confiscated from the apartment.

In the Proton Satria car

[15] In the presence of the first and second appellants, as well as members of the police raiding party, SP6 discovered an umbrella with the words 'KotaSAS' written on it which is opened up, at the Proton Satria's footwear area of the rear passenger's seat. SP6 took the umbrella and saw one bag which is a large black colored plastic bag containing ten lumps of compressed plastic containing cannabis.

[16] After that, the SP6 checked the boot of the Proton Satria and found two black plastic bags which contained the followings:

(a) one of the plastic bags contained 22 lumps of big compressed plastic containing cannabis; and

(b) the other plastic bag contained 25 lumps of big compressed plastic containing cannabis.

The nett weight of all 47 pieces of the cannabis totaled 54,215g.

[17] SP6 then confiscated all the case items and contacted the Investigating Officer, ASP Roslan bin Tambi ('SP7') and the police forensic officer. SP6 then proceeded to prepare a search list (exh P96 and exh P97) at the scene. SP7 and

A the forensic officers went to the apartment and to Car Park Lot 501. After the forensic officers have checked and processed fingerprints on all the relevant case items, SP6 then seized all case items and arrested both the first and second appellants. In addition, SP6 also made a marking on all the case items found at the apartment and at Car Park Lot 501. Having made the markings, at about
B 5.30pm, both the first and second appellants were detained and taken away to IPD Dang Wangi for further investigation.

[18] Upon arrival at IPD Dang Wangi at about 6pm, SP6 weighed all the
C case items seized. Apart from that, SP6 also made two separate police reports namely Police Report Chow Kit 127/17 (exh P95) for the raid and the drugs seized at the apartment and another Chow Kit Police Report No 129/17 (exh P96) for the raid and the seizures of drugs from the Proton Satria at Car Park Lot 501. SP6 also took a urine test of both the first and second appellants
D and prepared the Handing Over Forms (exh P99 and exh P100) between SP6 and SP7.

[19] From an investigation of SP7 on SP1, it showed that SP1 is the owner of the apartment and the apartment was rented to the second appellant
E through a real estate agent, Lee Yek Goh ('SP3'). While Car Park Lot 501, at Level 1 of the Regalia Service Apartments was rented by Che Wan Nadilah bt Che Wan Nadzamuddin ('SP2') to the second appellant. The Proton Satria which was confiscated by the police, was purchased by the first appellant but registered in the name of the first appellant's younger brother, Mohd Nor
F Shawal bin Zulkifli ('SP8'). SP8 just use the car for a month and later, the car was handed back to the first appellant.

[20] On 6 January 2017, at 2.30pm, SP7 instructed the police
G photographer, Corp Jalil came to the SP7's office to take photographs of the case items. Then all drug case items received by SP7 from SP6 were put into five case goods boxes and one goods case envelope. Every box and envelope of case items was duly marked by SP7 and submitted to the Department of Chemistry Malaysia in Petaling Jaya, for analysis on the same date, at 4.33pm. On the
H same day, at about 6pm, SP7 along with the SP6 and the police photographer went back to the apartment and the car park to take photographs.

[21] On 11 April 2017, SP7 received the drugs case items which have been analyzed by the Chemist, Wan Rahimah bt Wan Ahmad ('SP5') along with
I chemistry report numbers No 17- FR-B-00512 (exh P14) and 17-FR-B-00515 (exh P30). The results analysis of SP5 confirmed that the case items are drugs as follows:

(a) 54,215g of cannabis seized from the Proton Satria which formed the subject matter of the first charge;

(b) 269.21g of methamphetamine seized from the apartment which formed the subject matter of the second charge;

(c) 17.60g of nimetazepam seized from the apartment which formed the subject matter of the third charge;

(d) 0.23g of heroin seized from the apartment which formed the subject matter of the fourth charge;

(e) 0.03g of monoacetylmorphines seized from the apartment which formed the subject matter of the fifth charge; and

(f) 2.15g of ketamine seized from the apartment which formed the subject matter of the sixth charge.

[22] The various drugs found at different locations of the apartment and in the Proton Satria formed the subject matter of the six charges.

FINDINGS OF THE HIGH COURT

[23] The learned High Court judge found, inter alia, as follows:

(a) that the first and second appellants have exclusive access and possession of the apartment;

(b) that from the evidence, a man named Murugan a/l Subramaniam ('Murugan') existed but on the day of the incident the second appellant agreed during cross-examination that Murugan did not bring any items with him to the apartment that morning;

(c) that the second appellant also said that Murugan, did not bring the 'Aeon Go Green' bag or the 'Cohiba' box which both contained the drugs;

(d) that the second appellant did not state or saw Murugan putting an 'Aeon Go Green' bag or a Cohiba Box or any other drugs on a table in the living room;

(e) that the existence of the 'Aeon Go Green' and 'Cohiba' bags are indeed already stored in the places where the bags were found;

(f) that the position of the 'Aeon Go Green' bag which contained the drugs hidden under the kitchen sink and the first appellant admitted that the drugs were found in the apartment;

(g) that the first and second appellants did not provide any explanation as to the existence of the 'Aeon Go Green' bag and that it is unreasonable for the first and second appellants, not to know about the bag when the apartment is completely under their control;

(h) that the first and second appellants' defences are mere denials of the existence of drugs found in the apartment;

(i) that the evidences of the first and second appellants failed to raise a reasonable doubt as to the prosecution's case;

(j) that the first and second appellants had exclusive control or custody and knowledge of the drugs. Therefore the first and second appellants had exclusive possession and knowledge of the drugs found in the apartment;

(k) that the first and second appellants in their defences failed to rebut the presumption of trafficking under s 37(d)(xvi) of the DDA 1952 on a balance of probabilities;

(l) that the inferences that can be drawn from the circumstances and facts of the case that there was common intention between the first and second appellants as they lived together in the apartment where the drugs were found under the sink in the kitchen, a place which is often used every day;

(m) the main thrust of the defence of the first appellant was that he had no full possession of the Proton Satria and denied possession of the drugs found in the Proton Satria. The Proton Satria was borrowed by his friend named Murugan and the car key and the car alarm control were with Murugan. Murugan did exist and was arrested but has not been called by the prosecution as a witness; and

(n) that the investigating officer, SP6 has managed to trace Murugan and after remand and interrogation, Murugan released.

THE FIRST APPELLANT'S CONTENTIONS

[24] Before us, the first appellant contended, inter alia, as follows:

(a) that the learned High Court judge failed to assess and take into account the defence of the first appellant properly or at all;

(b) that the learned High Court judge convicted the first appellant based on the evidence of SP6 which is not corroborated by other witnesses of the prosecution;

(c) that the conviction is unsafe as there are two different versions of events, firstly the prosecution's evidence which is primarily based on the uncorroborated SP6 and the first appellant's evidence/defence which is supported by the evidence of SP1 and SP8;

(d) that the learned High Court judge failed to invoke an adverse inference under s 114(g) of the Evidence Act 1950 as the prosecution failed to call one, Murugan and further he is also not on the list of any prosecution

witnesses as Murugan also had access to the apartment where the drugs were found; and

(e) that in fact, the drugs were not found by SP6 himself because he was not the one who made the search in the apartment. Thus, SP6's evidence is hearsay evidence which is not being supported or corroborated by other officers present during the search who were not called. Section 114(g) of the Evidence Act should be invoked.

THE SECOND APPELLANT'S CONTENTIONS

[25] Before us, the second appellant contended, inter alia, as follows:

(a) that the learned High Court judge in making her decision, erred in invoking the double presumptions, which had been ruled unconstitutional in the case of *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2015] 5 CLJ 780;

(b) that the learned High Court judge in her decision, has misdirected herself, in invoking double presumptions on knowledge and trafficking under s 37(d) of the DDA 1952 and s 37(da)(xvi) of the DDA 1952;

(c) that the prosecution has failed to prove that any common intention under s 34 of the Penal Code in respect of the six charges as they showed that there was some sort of participation either actively or passively on the second appellant's part; and

(d) that the learned High Court judge had misdirected herself, in failing to give due consideration or evaluation of the second appellant's defence.

OUR ANALYSIS AND DECISION

[26] In the three appeals before us, there are three common issues raised by the first and second appellants namely:

(a) the issue of s 34 of the Penal Code;

(b) that the testimony of SP6 was not corroborated and therefore not safe. The first and second appellants did not lead the police to the Proton Satria. The police knew about the existence of the Proton Satria and the drugs found in the Proton Satria was not theirs; and

(c) that the Proton Satria was lent to Murugan who had the car key and the car alarm control and the Appellants did not know how the door of the Proton Satria was opened by SP6. Thus, Murugan should be called.

Consideration of the common issues raised by the first and second appellants

A The issue of s 34 of the Penal Code

[27] It is trite law that s 34 of the Penal Code is a rule of evidence and does not create a substantive offence.

B

[28] In the Federal Court case of *Krishna Rao a/l Gurumurthi v Public Prosecutor and another appeal* [2009] 3 MLJ 643; [2009] 2 CLJ 603, Richard Malanjum CJ (Sabah and Sarawak) (as he then was) held, inter alia, as follows:

> [61] The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. It has been said that as common intention essentially being a state of mind direct evidence as proof is difficult to procure. Invariably inferences have to be relied upon arising from such acts or conduct of the accused, the manner in which the accused arrived at the scene, the nature of injury caused by one or some of them or such other relevant circumstances available. Indeed the totality of the circumstances must be taken into consideration in arriving at a conclusion whether there was common intention to commit the offence for which the accused can be convicted. The facts and circumstances of each case may vary. As such each case has to be decided based on the facts involved. Whether an act is in furtherance of the common intention is an incident of fact and not of law.
>
> [62] For a charge premised on common intention to succeed it is essential for the prosecution to establish by evidence, direct or circumstantial, that there was a plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of s 34 notwithstanding that it was pre-arranged or on the spur of the moment provided that it must necessarily be before the commission of the offence.

C

D

E

F

[29] The first and second appellants were charged for committing all the six charges with read with s 34 of the Penal Code. The learned High Court judge found at the end of the prosecution's case that there was a common intention between the first and second appellants in respect of the commission of the second to fifth charges. This is what she said at para [28] of her grounds of judgment which states as follows:

G

> [28] Dari keterangan adalah jelas 'jagaan dan kawalan' dibuktikan secara terus. Bukti keterangan yang dikemukakan adalah cukup untuk menunjukkan bahawa atas dadah-dadah tersebut. Saya juga mendapati terdapatnya 'irresistible inferences' yang mana OKT1 dan OKT2 mempunyai pengetahuan terhadap dadah-dadah dan peralatan berkaitan yang dijumpai bahagian dapur dan ruang tamu rumah tersebut untuk pertuduhan kedua hingga keenam.

H

I

[30] Further at the end of the defences' cases, the learned High Court judge, after having re-evaluated the evidences adduced by the prosecution with the evidence of the defences, still found that there was the requisite common intention. This is what the learned High Court judge said at paras [60] and [65]

of her grounds of judgment:

> [60] OKT1 tidak semestinya secara langsung melakukan perbuatan jenayah itu, tetapi cukup dengan penglibatannya dalam siri-siri perbuatan OKT2 menunjukkan bahawa mereka mempunyai niat bersama untuk melakukan perbuatan jenayah sebagaimana yang disebut dalam kes *Ghazalee bin Kassim & Ors v Public Prosecutor* [2018] supp MLJ 461; [2009] 4 CLJ 737 'it is sufficient that the participated jointly with the other'.
>
> ...
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> [65] Oleh yang demikian inferens yang boleh dicapai yang boleh mengaitkan niat bersama OKT1 dan OKT2 adalah mereka tinggal bersama di apartmen dimana dadah tersebut dijumpai di dapur di bawah sinki iaitu di mana tempat tersebut sering digunakan setiap hari. Tambahan pula apartmen tersebut secara eklusifnya didiami oleh OKT1 dan OKT2. Daripada keterangan SP6 juga menyatakan bahawa selain dari Aeon beg yang dijumpai di bawah sinki dalam cabinet, SP6 juga menjumpai satu kotak tulisan COHIBA yang didalamnya mengandungi dadah berbahaya di atas meja kecil di ruang tamu. Pemeriksaan lanjut di ruang tamu juga menjumpai satu sealent, pemetik api, satu botol kaca yang diubahsuai untuk menghisap dadah dan paket plastik. Pada pendapat saya agak mustahil OKT1 dan OKT2 tidak mempunyai pengetahuan terhadap semua barang tersebut yang berkaitan dengan dadah dan termasuk penemuan dadah berbahaya itu sendiri. Saya tidak dapat menerima alasan OKT1 dan OKT2 bahawa sealent dan paket plastik ada untuk kegunaan persiapan perkahwinan mereka kerana tiada sebarang barangan perkahwinan dikemukakan di mahakamah ini untuk menyokong alasan tersebut. Adalah bahawa sealent dan paket plastik ada untuk kegunaan persiapan perkahwinan mereka kerana tiada sebarang barangan perkahwinan dikemukakan di Mahkamah ini untuk menyokong alasan tersebut. Adalah mustahil juga OKT1 dan OKT2 tidak mempunyai pengetahuan mengenai dadah yang dijumpai secara terbuka di atas meja di ruang tamu.

[31] Reverting to the present case, the learned High Court judge held that that common intention had been established relying on the inferences gathered from the various facts and circumstances proved.

[32] We are of the view that the learned High Court judge had carefully and meticulously examined each and every piece of circumstantial evidence adduced before her, drawing the appropriate inferences and findings of facts and applying the legal principles associated with s 34 of the Penal Code before concluding that the first and second appellants had acted with common intention in the trafficking and possession of the drugs which formed the subject matter of the second to the sixth charges.

[33] We are of the considered view that from the various inferences drawn, from the fact that the first and second appellants were staying together in the apartment or at least the first appellant had access to the apartment and the first and second appellants had exclusive access to the apartment. Besides the

discovery of drugs in the cabinet under the sink in the kitchen of the apartment, a place which is often used daily, SP6 also found a paper box 'COHIBA' which contained dangerous drugs on a small table in the living room. Further examination of the living room also found an impulse tool sealer, cigarette fire, a bottle of glass was modified for drugs and plastic package.

[34] We find that such open display of the above items showed that the first and second appellants should have knowledge of all that is associated with drugs. Further, the learned High Court judge found that the impulse tool sealer and packets of plastic are not the type used for the preparation of the wedding of the first and second appellants as there is no evidence that there was a pending marriage. It is also impossible for the first and second appellants, not have to knowledge of the drugs found in the open, on a table in the living room of the apartment.

[35] Thus, we are of the considered view that there is no error in the finding and conclusion of the learned High Court judge which warrants our intervention.

[36] Accordingly, we find no merit in the submissions of learned counsels for the appellants that the elements of s 34 of the Penal Code have not been established by the prosecution.

The issue of non-corroborration of SP6's evidence

[37] The appellants contended that the testimony of SP6 was not corroborated and therefore not safe. The appellants further contended that the appellants did not lead the police to drugs found in the sink in the kitchen, to the Proton Satria and the police already knew about the existence of the Proton Satria and the drugs found in the Proton Satria were not theirs.

[38] We are of the considered view that the learned High Court judge have correctly found that the prosecution have proven that the first appellant and the second appellant has control, custody and knowledge of drugs found in the following areas, in the apartment namely in the cabinet under the sink in the kitchen, in the living room and in the guest room:

(a) during the raid, the first appellant was in the living hall of the apartment and the second appellant opened the door of the apartment after SP4 knocked on the door;

(b) the apartment was rented by the second appellant from the owner of the apartment namely SP1, since 1 June 2016 through the introduction of SP3, the real estate agent;

(c) the keys to the apartment and two access card were given to the second appellant by SP3;

(d) SP4, the Chief Security Guard confirmed that the Proton Satria belonged to the first appellant and was parked in Car Park Lot 501 which showed the first appellant come and/or live in the apartment with the second appellant;

(e) SP8, the younger brother of the first appellant stated that the first appellant did not live with him or with their mother and SP8 did not know where he stay. The second appellant stated that she had given one key of the apartment to the first appellant; and

(f) the first appellant and second appellant were engaged and they admitted that the apartment is for them to stay after getting married. The first appellant also paid the rent of the apartment.

DRUGS IN THE PROTON SATRIA

[39] The evidence adduced and the findings of the learned High Court judge showed that the first appellant have custody, control and knowledge of the drugs found in the Proton Satria namely:

(a) SP8, the younger brother of the first appellant confirmed that the Proton Satria was purchased by the first appellant, in November 2016 under his name and the first appellant used the Proton Satria. Further, SP8 did not make any duplicate car key;

(b) SP4 confirmed that the Proton Satria was parked in Car Park Lot 501 and the first appellant was identified as the person who parked the car;

(c) SP6 stated that the first and second appellants guided them to the Proton Satria and the car door was opened with the car alarm control found in the apartment;

(d) the first appellant admitted that the Proton Satria was bought by him;

(e) the drug was found on the floor in the leg area of the rear passenger seat and also in the boot of the Proton Satria. In this case, the drug can be seen clearly; and

(f) the car key and car alarm control of the Proton Satria were seized in the apartment in the presence of the appellants who were present at the time when the raid was conducted by SP6.

[40] We are of the considered opinion that properly made factual findings are something which should not be disturbed by an appellate court and in in the present case, we affirm the factual findings of the learned High Court judge

(see *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 236).

Drugs found at different locations in the apartment namely below the cabinet under the sink in the kitchen and at guest room

[41] We are of the considered view that from the evidence adduced and the findings of the learned High Court judge, they correctly showed that the first and second appellants have custody, control and knowledge of the drugs found inside the apartment namely:

(a) during the raid, the second appellant opened the door of the apartment after SP4 knocked;

(b) the evidence showed that other than the first and second appellants, no one else inhabits or had access to the apartment;

(c) the 'irresistible inferences' is that the first appellant and second appellant have custody, control and knowledge of the drugs and related equipment found in the kitchen and living room of the apartment which formed the subject matters of the second charge to the sixth charge;

(d) the drugs found at the guest room can easily be seen;

(e) the drugs were found together with other things which were connected or related to drugs trafficking; and

(f) the drugs found in the plastic bag in the cabinet under the sink in the Kitchen sink were hidden or concealed to avoid detection and from being seen. In *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633, the court held as follows:

> While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather the court appraise the entire facts of the case to see if the accused's claim to ignorance is credible.

[42] We are of the considered view that the prosecution have adduced credible evidence to show that the first and second appellants have control, custody and possession of drugs found in the apartment and that the first appellant had control, custody and possession of drugs found in the Proton Satria and such evidence have not been rebutted by the first and second appellants.

[43] In specific consideration of the appellants' contention that SP6's evidence was uncorroborated and therefore unsafe, we are of the considered opinion that in the light of the learned High Court judge's finding that SP6 was a credible witness and that his evidence was also credible, we see no good reason to interfere with the credibility of SP6 as he is a competent witness and his evidence need not be corroborated.

Trafficking

[44] In the light of the weights of the dangerous drugs in respect of the first and second charges, which exceeded the amounts stated in s 37(da)(vii) of the DDA 1952 — for cannabis (exceeding over 200g) and in s 37(da)(xvi) of the DDA 1952 for methamphetamine (exceeding over 50g), the learned High Court judge, having found that the first and second appellants had actual possession of the drugs, rightfully invoked the presumption under s 37(da) of the DDA 1952 and the first and second appellants are presumed to be trafficking in following dangerous drug namely, methamphetamine weighing 269.21g and for the first appellant, he is also presumed to be trafficking a dangerous drug namely cannabis weighing 54, 215g.

Issue of s 114(g) of the Evidence Act 1950

[45] The appellants contended that the Proton Satria was lent to Murugan who had the car key and the car alarm control before the police raid and the first and second appellants did not know how the door of the Proton Satria can be opened by SP6. Thus, Murugan should be called but he was not. Thus, The appellants contended that an adverse inference under s 114(g) of the EA 1950 ought to drawn against the prosecution for failing to call or offer him to the appellants.

[46] During SP6's and SP7's testimonies, they confirmed that Murugan was arrested on 5 January 2017 at approximately 11pm in the swimming pool area of Regalia Service Apartments. According to SP7, after Murugan arrested, he was released after an investigation was made into the alleged car key of the Proton Satria which was supposed to be with Murugan. SP7 also confirmed that there is no Proton Satria's keys seized from Murugan who was released on the instructions of the deputy public prosecutor.

[47] During his cross-examination, SP7 did not agree that the key of the Proton Satria was with Murugan. SP7 confirmed that the Proton Satria's car alarm control was seized in the apartment and was used to open the doors of the Proton Satria. SP7 also admitted that the Proton Satria's car alarm control was not stated in the search lists namely, exhs P97 and P98 but it was stated in the handing over form between SP6 and he (exh P100), at item 7.

[48] In the cross examination of SP6, he did not agree that the car alarm control of the Proton Satria was confiscated from Murugan. During re-examination, SP6 stated that there was an error in the search lists (exhs P96 and P97) as he did not state that there are two sets of car keys with alarm controls seized.

[49] At the end of the prosecution's case, even though Murugan was not offered to the defense, there was no concealment or suppression of evidence on the part of the respondent. Thus, we are of the view that that s 114(g) of the EA 1950 does not apply. See *Munusamy v Public Prosecutor* [1987] 1 MLJ 492.

[50] Further, the respondent had succeeded in proving all the essential elements of all the charges and there was no be void or gap in the respondent's case in the absence of Murugan as their witness. In *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630 at p 661, the Federal Court held as follows:

> [42] In connection with his submission on the adverse inference under *s 114(g) of the Evidence Act*, learned counsel also contended that the prosecution should have called Chantana to exclude her as having access to the first house, and that the failureby the prosecution to do so resulted in its failure to prove exclusive possession or occupation of the first house by Siew resulting in the failure to prove exclusive possession of the proscribed drugs by Siew. As would be recalled, this point was also raised by learned counsel when he submitted on the failure by the prosecution to prove exclusive possession of the proscribed drugs. We have dealt with this point. We have said that we were unable to agree with the submission and we have set out the reasons for the same at length. Anyway, in the context of *s 114(g) of the Evidence Act*, learned counsel's submission brought into focus the issue of the prosecutorial discretion in the calling of witnesses in a criminal prosecution. It is well settled that in a criminal case, the prosecution, provided that there is no wrong motive, has a discretion as to what witnesses should be called by it (see *Khoon Chye Hin v Public Prosecutor* [1961] 1 MLJ 105b (CA), *Adel Muhamed El Dabah v Attoney General of Palestine* [1944] AC 168, *Public Prosecutor v Datuk Seri Anwar Ibrahim (No 3)* [1999] 2 MLJ 1). *However, that prosecutorial discretion must be subject to the most basic limitation that it has to produce all the necessary evidence to prove the case against the accused beyond reasonable doubt* (see *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16 at p 19, (SC)). Thus, in Teoh Hoe Chye v PP *Yeap Teong Tean v Public Prosecutor* [1987] 1 MLJ 220, Abdul Hamid CJ (Malaya) (as he then was) said at p 229:
>
> > *Nevertheless, the decision whether to call or not to call a witness including a witness from whom a statement has been taken is always the right of the prosecution (Abdullah Zawawi v Public Prosecutor). In so far as the trial court is concerned, its duty is essentially to decide whether on the evidence before it the prosecution has proved its case, and if there are unsatisfactory features in the prosecution case to determine whether, in the light of such features, the prosecution case fell short of proof beyond reasonable doubt (Abdullah Zawawi's case).*

[43] In other words, in the end it is the sufficiency of the evidence that matters. In the present appeal, we find no such unsatisfactory features or gap in the prosecution's case. Indeed, as is clear in this judgment and for reasons which we have explained we are satisfied that the learned trial judge was right in holding that a prima facie case of trafficking in dangerous drugs had been made out against Siew. (Emphasis added.)

[51] In *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 at pp 728–729; [2000] 4 CLJ 649 at pp 673–674, the Federal Court held:

Thus the question to be asked in each case is whether the prosecution has proved its case even without calling some other witnesses who are available. An adverse inference cannot be drawn for failure to call a witness when the prosecution has discharged its burden (see *Namasiyiam & Ors v Public Prosecutor* (1987] 2 MLJ 336:*Kadir Awang v Public Prosecutor* [1989] 2 MLJ 33; *Jazuli Mohsin v Public Prosecutor* [1990] 2 MLJ 190; *Lim Young Sien v Public Prosecutor* [1994] 2 SLR 257). As Yong Pung How CJ said in *Chua Keem Long v Public Prosecutor* [1996] 1 SLR 510 at pp 523–524:

> The appellant's contention was that the failure of the prosecution to adduce the evidence of those other gamblers meant that the court could presume that the evidence would have gone against the prosecution, that is there were no such visits.
>
> Such arguments are commonly made. Commonly too, such arguments are without merit. The court must hesitate to draw any such presumption unless the witness not produced is essential to the prosecution's case. Any criminal transaction may be observed by a number of witnesses. *All the prosecution need to do is to produce witnesses whose evidence can be believed so as to establish the case beyond a reasonable doubt. Out of a number of witnesses, it may then only be necessary to bring in one or two; aslong as those witnesses actually produced are able to give evidence of the transaction, there is no reason why all of the rest should be called, nor why any presumption should be drawn that the evidenceof those witnesses not produced would have been against the prosecution.*

In such circumstances it is alsonot necessary for the prosecution to offer or make available the remaining witnesses to the defence. As Yong Pung How CJ said in *Satli Masot v Public Prosecutor* [1999] 2 SLR 637 at p 649:

> We were of the view that when s 116 illustration (g) (our s 114(g)) is sought to be invoked on account of the prosecution's failure to offer particular witnesses to the defence, the rule should be no different from a case where the contention is that the prosecution has failed to call particular witnesses. *In both cases, whether an adverse inference should be drawn should depend on the materiality of the witness not called/offered and whether the failure to do so constitutes a withholding of evidence from the court or the accused. On our facts, just as there was no basis for drawing an adverse inference against the prosecution on account of their failure to call the two named CNB officers as witnesses, we were of the view that there was similarly no basis for drawing an adverse inference against the prosecution on account of their failure to offer the two officers to the defence.*

> This principle has been recognised by our Federal Court in *Pendakwa Raya v Mansor Mohd Rashid* [1996] 3 MLJ 560 and the Court of Appeal in *Lee Lee Chonag v Public Prosecutor* [1998] 4 MLJ 697 where it was held, on the facts of the cases, that the failure by the prosecution to call witnesses or to make them available to the defence at the close of its case was not fatal at that stage ... (Emphasis added.)

[52] We are in agreement with the learned High Court judge's finding that that there was no basis to draw an 'adverse inference' under s 114(g) of the Evidence Act 1950 against the respondent for not calling Murugan to testify. We are of the considered view that Murugan is not relevant or material to the prosecution's case. In any event, the defence could always call Murugan in support of their case. We are also of the opinion that there was no suppression of evidence on the part of the prosecution and that the prosecution have adduced sufficient evidence to prove their cases against the first and second appellants.

DOUBLE PRESUMPTIONS

[53] The second appellant contended that the learned High Court judge erred in using double presumptions as stated in s 37(d) and (da) DDA 1952, as decided in the case of *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2015] 5 CLJ 780.

[54] From our perusal of the grounds of judgment of the learned High Court judge, in particular para [32] of the grounds of judgment as alleged by the appellants, we are of the considered view that the learned High Court judge did not invoke any double presumption.

[55] The same goes for the drugs found in Proton Satria where the learned High Court judge held at para [29] of her grounds of judgment that the first appellant had control and custody of the Proton Satria. Similarly, the learned High Court judge also did not invoke the presumption under s 37(d) of the DDA 1952.

[56] In the premises, we are of the view that there are no merits in the appellants' contention.

THE DEFENCES OF FIRST AND SECOND APPELLANTS

[57] In the light of various adduced by the respondent and the appellants, we are of the considered view that the learned High Court judge was correct when she found that the defenses of the first and second appellants are mere denials of the existence of the drugs found in the apartment and in the Proton Satria and did not manage to create any reasonable doubt in the respondent's case and

rebutted the presumption of trafficking under s 37(da) of the DDA 1952.

[58] Having read the learned HCJ's grounds of judgment, we are of the view that the learned HCJ had adequately and in fact, had thoroughly assessed the defence's cases before coming to his findings.

CONCLUSION

[59] In her grounds of judgment, the learned HCJ held that the appellants failed to rebut the statutory presumption under s 37(d) of the DDA on a balance of probability. Hence, from the evidence and the findings of the learned High Court judge, we are in agreement with the learned High Court judge that the first and second appellants to raise a reasonable doubt on the case of the prosecution.

[60] Based on the aforesaid reasons, we found no merit in the grounds of appeal canvassed before us and we unanimously find that the sentences and convictions against the first and second appellants are safe and as such we unanimously dismiss the first and second appellants' respective appeals against sentence and conviction. The learned High Court judge's decisions on the respective convictions and sentences of the first and second appellants are affirmed.

Appeals dismissed, convictions and sentences affirmed.

Reported by Ashok Kumar